

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION**

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Henry Stewart, Jr.,  
Plaintiff,

vs

Case No. C-1-09-887  
(Spiegel, J)  
(Wehrman, M.J.)

Michael J. Astrue,  
Commissioner of Social Security,  
Defendant.

**REPORT AND  
RECOMMENDATION**

This matter is before the Court on Plaintiff's Motion for Review Hearing (Doc. 18), which this Court construes as a Motion for Relief from Judgment pursuant to Federal Rule of Civil Procedure 60(b). To date, Defendant has filed no response to Plaintiff's motion.

**BACKGROUND**

On April 6, 2010, Plaintiff was ordered to file a statement of errors and fact sheet. (Doc. 9). That Order was subsequently returned as undeliverable on April 26, 2010. On May 3, 2010, Plaintiff was ordered to show cause why the Court should not dismiss his Complaint for lack of prosecution. (Doc. 12). On May 24, 2010, the Order was returned marked refused. (Doc. 13). Thereafter, the Magistrate Judge issued a Report and Recommendation that Plaintiff's Complaint be dismissed for lack of prosecution and failure to abide by a court order. (Doc. 14). Plaintiff was served with the Report and Recommendation on May 27, 2010. (Doc. 15). Plaintiff was informed of his right to file objections to the Magistrate Judge's Report and Recommendation within fourteen days after being served with a copy of such. (Doc. 14). No objections were filed. Thus, on July 15, 2010, the Court entered its Opinion and Order, adopting and affirming the Magistrate Judge's Report and Recommendation and dismissing Plaintiff's Complaint for lack of prosecution and failure to abide by a court order. (Doc. 16). On the same date, the Clerk entered Judgment dismissing Plaintiff's Complaint and terminating this case from the Court's docket. (Doc. 17). On July 16, 2010, Plaintiff filed his present motion stating only that he did not receive a copy of the Court's Order and Judgment. (Doc. 18).

**OPINION**

The decision to grant a Rule 60(b) motion is within this Court's discretion. *Williams v. United Dairy Farmers*, 188 F.R.D. 266, 271 (S.D. Ohio Sept. 20, 1999)(citing *Amernational Industries, Inc. v. Action-Tungstram, Inc.*, 925 F.2d 970, 975 (6<sup>th</sup> Cir. 1991)). Rule 60(b) provides that:

On motion and upon such terms as are just, the court may relieve a party or a

party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. . .

Fed. R. Civ. P. 60(b).

Plaintiff's motion appears to be brought pursuant to Fed. R. Civ. P. 60(b)(1), which permits relief from final judgment for the following reasons: mistake, inadvertence, surprise, or excusable neglect. In order to receive relief under Rule 60(b)(1), the plaintiff must demonstrate both the existence of the mistake, inadvertence, surprise, or excusable neglect, and a meritorious claim or defense. *Merriweather v. Wilkinson*, 83 Fed.Appx. 62, 2003 WL 22905293 at \*2 (6<sup>th</sup> Cir. Nov. 25, 2003); *Marshall v. Monroe & Sons, Inc.*, 615 F.2d 1156 (6<sup>th</sup> Cir. 1980).

Plaintiff has not alleged any facts which suggest that relief from judgment is warranted in this case. It is clear that Plaintiff received service of the Court's Report and Recommendation in which he was informed that failure to file objections within fourteen days may result in a forfeiture of his rights on appeal. (Doc. 14). Nonetheless, Plaintiff failed to file objections. For this reason, we find that Plaintiff's Motion for Review Hearing (Doc. 18) is without merit and therefore recommend that said motion be denied.

**IT IS THEREFORE RECOMMENDED THAT:**

- 1) Plaintiff's Motion for Review Hearing (Doc. 18) be DENIED.

Date: November 5, 2010

s/ J. Gregory Wehrman

J. Gregory Wehrman

United States Magistrate Judge

**NOTICE TO THE PARTIES REGARDING THE FILING  
OF OBJECTIONS TO THIS R&R**

Pursuant to Fed. R. Civ. P. 72(b), within fourteen (14) days after being served with a copy of the recommended disposition, a party may serve and file specific written objections to the proposed findings and recommendations. This period may be extended further by the Court on timely motion for an extension. Such objections shall specify the portions of the Report objected to and shall be accompanied by a memorandum of law in support of the objections. If the Report and Recommendation is based in whole or in part upon matters occurring on the record at an oral hearing, the objecting party shall promptly arrange for the transcription of the record, or such portions of it as all parties may agree upon, or the Magistrate Judge deems sufficient, unless the assigned District Judge otherwise directs. A party may respond to another party's objections within fourteen (14) days after being served with a copy thereof. Failure to make objections in accordance with this procedure may forfeit rights on appeal. *See United States v. Walters*, 638 F.2d 947 (6<sup>th</sup> Cir. 1981); *Thomas v. Arn*, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985).